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ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives

Erica HOWARD*

In a large number of cases, the European Court of Justice (ECJ) has held that the principle of equality and non-discrimination is a general and fundamental principle of Community law, the observance of which the ECJ has to ensure. This article argues that the ECJ has, in a number of recent cases concerning the Equality Directives of 2000, taken further steps towards the development of this principle and has bestowed on these Directives horizontal direct effect based on the fact that they are specific expressions of the, both horizontally and vertically, directly effective principle of equality.

1. INTRODUCTION

The right to equality/non-discrimination is a fundamental human right established by all major global and regional human rights instruments.¹ Yet it appears to be the European Court of Justice (ECJ) and not the European Court of Human Rights (ECtHR) which is taking the lead in advancing equality/equal treatment in Europe. The principle of equal treatment and non-discrimination is, as the ECJ has established in a large number of cases, one of the general principles of Community law.² In a Communication from 1995, the European Commission itself has said that ‘the right to equal treatment and freedom from discrimination is one of the core principles underlying all Community policies’.³ This already indicates the nature of the general principles of Community law: these are principles which are applicable to the EU Institutions and to the Member States when they are implementing EU law. In this article, I show that the ECJ was quite active in developing a strong general principle of equality and non-discrimination up to the second half of the 1990s, but then took a step back and left it to the EU legislator to make advances in this area via EU Equality Directives.⁴ However, in a number of recent cases concerning these

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¹ See, for example, Arts 1, 2 and 7 of the United Nations Universal Declaration of Human Rights, Arts 2 and 26 of the International Covenant on Civil and Political Rights; Art. 2 of the International Covenant on Economic, Social and Cultural Rights; and, for Europe, Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Art. 1 of Protocol 12 to the ECHR.

² In this article, I will not make a distinction between the terms equality, equal treatment and non-discrimination, as the ECJ does not appear to do so in their case law.

³ COM (1995) 653, Communication from the Commission on Racism, Xenophobia and Anti-semitism, and Proposal for a Council Decision Designating 1997 as the European Year against Racism.

⁴ Council Directive 2000/43/EC of 29 Jun. 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 (hereinafter, ‘the Race Directive’) and Council

directives, the ECJ has again mentioned the importance of equality as a general principle of Community law.

In 2003, Waddington wrote that the principles of equality and non-discrimination 'do not (yet) amount to an independent legal competence'.⁵ She continued:

In addition to the Charter [Charter of Fundamental Rights of the European Union], which devotes a complete Chapter to equality, Article 13 EC [now Article 19 TFEU] and the Directives based thereon, are now driving forward the recognition of the equality and non-discrimination principle in EU law, rather than the Court's case law.⁶

In this article, I argue that there are now clear signs that the ECJ has, after a period of lower activity, once again taken a more prominent role in the development of the principle of equal treatment and non-discrimination as a general principle of Community law. To demonstrate this, the article is divided into a number of parts. In part 2, the early cases will be analysed, and this is followed, in part 3, by a very short overview of the legislative developments that took place around 2000 and an examination of more recent cases of the ECJ on the Equality Directives of 2000 where the principle of equality and non-discrimination has been mentioned and where the prohibition of discrimination has been held to be a specific expression of this general principle. It is argued here that the consequence of this is that the prohibition of discrimination appears to have been given horizontal direct effect. In general, EU Directives are considered to have vertical direct effect, providing certain conditions are fulfilled, but not horizontal direct effect. This means that they can be relied on by private parties before a national court against the state or against an emanation from the state (vertical) but not against other private parties (horizontal).⁷ The ECJ cases discussed suggest that the Equality Directives, because they are a specific formulation of the general principle of equality, have horizontal direct effect as well. The article concludes with an analysis of the importance of these latest developments and their ramifications for both EU law and the national law of the Member States.

2. ECJ CASE LAW BEFORE THE EQUALITY DIRECTIVES

General principles of Community law are principles introduced by the ECJ and are applied where relevant. These principles are derived from the law of the Member States and international treaties. The ECJ held in the *Nold* case that:

fundamental rights form an integral part of the general principles of law which the European Court enforces. In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the member-States...the international treaties on the

Directive 2000/78/EC of 27 Nov. 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 (hereinafter, 'the Employment Equality Directive').

⁵ L. Waddington, *The Expanding Role of the Equality Principle in European Union Law* (2003) Policy Paper, Robert Shuman Centre of Advanced Studies, European University Institute, 21.

⁶ *Ibid.*, 22.

⁷ For more information on vertical and horizontal direct effect the reader is referred to text books on EU law, for example, J. Steiner, L. Woods & C. Twigg-Flesner, *EU Law*, 9th edn (Oxford: OUP, 2006), 94–104; P. Craig & G. de Burca, *EU Law, Text, Cases and Materials*, 9th edn (Oxford: OUP, 2008), 279–304.

protection of human rights in which the member-States have co-operated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law.⁸

Therefore, to decide which principles are general principles, the ECJ looks at the common constitutional traditions of the Member States and to international human rights law instruments. Both support the existence of a fundamental principle of equality and non-discrimination. A right to equality before the law and non-discrimination can be said to be part of the constitutional traditions of the Member States, as most of the twenty-seven EU Member States have a guarantee of equality before the law and a prohibition of discrimination in their Constitutions.⁹ A right to equality before the law and non-discrimination can also be said to exist within a number of international human rights instruments of which the EU Member States are signatories, some of which have already been mentioned.¹⁰

The importance of these principles as a source of Community law lies in the fact that 'they pose significant limitations on the policy-making powers of the Community institutions and of the Member States'.¹¹ For example, in *Nold*, AG Trabucchi said that, among other rights, the principles of equality, of non-discrimination, 'form a part of that concept of law which governs and forms the framework for the whole Community system and from which that system, even in its application to individual cases, may never deviate'.¹²

These principles perform the following functions: they provide an aid to interpretation of Community law and of the laws of the Member States which implement Community law; they may be used to challenge Community action or inaction; and they may be used as a means of challenging action by a Member State, where this Member State is acting within the context of Community law.¹³

A number of principles have been held to be general principles of Community law, but this article only addresses the principle of equality/equal treatment/non-discrimination.¹⁴ To do this, it is necessary to start with an analysis of the early ECJ case law.

In a number of cases relating to very different subjects, the ECJ and its AGs have referred to equality or equal treatment or non-discrimination as a general or fundamental

⁸ Case C-4/73 *Nold v. Commission* [1974] ECR 491 ECJ, para. 13.

⁹ See, for example, Art. 1 Dutch Constitution, Art. 40(1) Irish Constitution, Art. 7(1) Austrian Constitution, Art. 14 Spanish Constitution, Art. 15 Romanian Constitution, Art. 32(1) Polish Constitution and Art. 28 Constitution of Cyprus.

¹⁰ See *supra*, n. 1.

¹¹ T. Tridimas, *The General Principles of Community Law*, 2nd edn (Oxford: OUP, 2006), 6.

¹² *Nold*, *supra* n. 8, Opinion AG Trabucchi.

¹³ Steiner et al., *supra* n. 7, at 115.

¹⁴ Other examples of principles which have been held to be general principles of Community law are: the right to legal protection; the principle of proportionality; the principle of legal certainty; the principle of the protection of legitimate expectations; the protection of fundamental rights; and the rights of defence. For more information on the general principles of Community law, the reader is referred to Tridimas, *supra* n. 11, and Steiner et al., *supra* n. 7, at 115–144. For more information specifically on the general principle of equal treatment, G. de Burca, 'The Role of Equality in European Community Law', in *The Principle of Equal Treatment in EC Law*, eds A. Dashwood & S. O'Leary (London: Sweet and Maxwell, 1997), 13–34; G. More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?', in *The Evolution of EU Law*, eds P. Craig & G. de Burca (Oxford: OUP, 1999), 517–552; and E. Ellis, *EU Anti-Discrimination Law* (Oxford: OUP, 2005), 315–344.

principle of Community law¹⁵ and have held that the ECJ has a duty to ensure the observance of this principle. In *Frilli v. Belgium*, a case concerning social security of migrant workers, the ECJ held that 'the rule of equality of treatment . . . is one of the fundamental principles of Community law'.¹⁶

In *Ruckdeschel*, discrimination between producers and consumers within the Community under the common agricultural policy was at stake. The ECJ held that the prohibition of discrimination, as laid down in the provision in question, is 'merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law' and that 'this principle requires that similar situations shall not be treated differently unless differentiation is objectively justified'.¹⁷ In *Defrenne v. Sabena No. 3*, which concerned equal pay between men and women for equal work, both the AG and the ECJ discussed the principle. AG Caportorti said that the exclusion of discrimination on the grounds of sex is one of the fundamental features of the non-discrimination principle,¹⁸ while the ECJ said that 'respect for fundamental personal human rights is one of the principles of Community law, the observance of which it has a duty to ensure' and that 'there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'.¹⁹

The question whether the dismissal of a trans-sexual person who had undergone a gender reassignment was against the prohibition of sex discrimination in Article 1 of the Equal Treatment Directive²⁰ was raised in *P v. S*.²¹ Both AG Tesouro and the ECJ answered this question positively and stated that the Directive was an expression of the principle of equality, which was one of the principles of Community law and one of the fundamental human rights whose observance the Court has to ensure.²² AG Tesouro said this case required 'a rigorous application of the principle of equality so that, therefore, any connotations relating to sex and/or sexual identity cannot be in any way relevant'.²³ The ECJ considered that:

the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.²⁴

¹⁵ The ECJ and the AGs appear to use the terms 'equality', 'equal treatment' and 'non-discrimination', see *supra* n. 2, and the terms 'general' or 'fundamental' as interchangeable.

¹⁶ Case C-1/72 *Frilli v. Belgium* [1972] ECR 457 para. 19.

¹⁷ Case C-117/76 *Ruckdeschel v. HZA Hamburg-St Annen* and Case C-6/77 *Diamalt Ag v. HZA Itzenhoe* [1977] ECR 1753 para. 7.

¹⁸ Case C-149/77 *Defrenne v. Sabena No. 3* [1978] ECR 1365 para. 4 (AG Caportorti).

¹⁹ *Defrenne No. 3*, *ibid.* paras 26 and 27 (ECJ).

²⁰ Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions [1976] OJ L 39/40 (hereinafter, 'Equal Treatment Directive').

²¹ Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143.

²² Opinion AG Tesouro, Case C-13/94 *P v. S and Cornwall County Council* 14 Dec. 1995 para. 22, and *P v. S*, *supra* n. 21, paras 18–19 ECJ.

²³ Opinion AG Tesouro, *ibid.*, para. 19.

²⁴ *P v. S*, *supra* n. 21, para. 20.

Therefore, both the AG and the ECJ extended the prohibition of sex discrimination to include discrimination because of gender reassignment, but there appears to be a difference between them. The AG sees this as an application of the general principle of equality, which goes beyond the Directive and protects against discrimination on grounds other than sex, while the ECJ sees it as falling under a wide interpretation of the term 'sex' in the Equal Treatment Directive.

In *Grant v. South-West Trains*,²⁵ AG Elmer followed AG Tesaro in *P v. S* and held that discrimination on the grounds of sexual orientation was also prohibited by EU law. Referring to *P v. S*, he considered that 'equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well' and that these rights 'apply to all without discrimination' and thus also to EU citizens who were homosexual.²⁶

However, the ECJ did not follow this approach and held that sexual orientation discrimination was not prohibited by Community law. It considered: 'although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community'.²⁷ The ECJ itself did give a reason for its reluctance to extend the gender equality provisions to include sexual orientation discrimination where it stated that the Treaty of Amsterdam, adopted in October 1997, allows the Council to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.²⁸ More writes that, in this case, 'the Court rejected the submission that there was an independently applicable principle of equality in Community law'.²⁹

The AGs and the ECJ did mention the principle in a couple of cases in the early 2000s, but on these occasions, they merely reiterated what was said before.³⁰

3. LEGISLATIVE DEVELOPMENTS AND ECJ CASE LAW FOLLOWING THIS

The ECJ already referred to the changes due to be brought in by the Amsterdam Treaty in *Grant* above.³¹ It is submitted that, with the adoption of that Treaty in 1997 and of two subsequent Equality Directives based on this, the EU legislator took over the role of developing the principle of equality and non-discrimination to provide protection against discrimination on a wider range of grounds.

²⁵ Case C-249/96 *Grant v. South-West Trains* [1998] 1 CMLR 993.

²⁶ *Ibid.*, para. 42 (AG Elmer).

²⁷ *Ibid.*, para. 45 (ECJ).

²⁸ *Ibid.*, para. 48 (ECJ).

²⁹ More, *supra* n. 14, at 545.

³⁰ See, for example, Case C-292/97 *Karlsson* [2000] ECR I-2737 Opinion AG Ruiz-Jarabo Colomer 26 Jan. 1999 para. 39; and ECJ, *Ibid.*, paras 37–9. Case C-189/01 *Jippes and Others v. Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689, para. 129; Case C-442/00 *Caballero v. Fogasa* [2002] ECR I-11915, para. 32; and, C-381/99 *Brunnhöfer v. Bank der österreichischen Postsparkasse* [2001] ECR 496 para. 28.

³¹ *Grant*, *supra* n. 25.

Another important step in this area of equality/non-discrimination was the solemn proclamation of the Charter of Fundamental Rights of the European Union³² at the Council in Nice in December 2000. These developments are briefly discussed in this part before the case law of the ECJ on this legislation is analysed.

The Treaty of Amsterdam of 1997, which came into force in May 1999, created, in Article 13 EC (now Article 19 TFEU), the competence for the EU Council to take, on a proposal from the Commission, appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Based on this, in June 2000 the Race Directive was adopted, prohibiting discrimination based on racial or ethnic origin, followed in November of that year by the Employment Equality Directive, prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation. These Directives can be said to have established a clear right to equal treatment and non-discrimination on all the mentioned grounds both in the EU and in the Member States, while such a right already existed in relation to sex under the Equal Treatment Directive.³³

The Charter of Fundamental Rights of the European Union was approved in October 2000 and solemnly declared at the Nice European Council in December 2000. However, the Charter was not legally binding until the Treaty of Lisbon came into force on 1 December 2009. Article 6(1) TEU now determines that ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’. The Charter has a Title III, which is headed ‘Equality’ and declares, in Article 20, that ‘everyone is equal before the law’. The Explanations to the Charter mention that this ‘corresponds to a general principle of law which is included in all European constitutions and has also been recognized by the Court of Justice as a basic principle of Community law’.³⁴

Article 21(1) of the Charter then prohibits ‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’. Article 21(2) prohibits discrimination on the ground of nationality. The Charter thus establishes a right to equality and non-discrimination on a wide and open-ended list of grounds and, as the Explanations state, addresses discrimination by the institutions of the Union and by the Member States when they are implementing Union law.³⁵

There was also some legislative activity in relation to sex discrimination. In 2002, the EU Council adopted a Directive to amend the Equal Treatment Directive to bring this more in line with the 2000 Equality Directives.³⁶ In 2004 a Directive was adopted to

³² Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 (hereinafter, ‘the Charter’).

³³ See *supra* n. 20.

³⁴ *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14 Dec. 2007, 17–35, explanation on Art. 20.

³⁵ *Ibid.*, 24.

³⁶ Council Directive 2002/73/EC of 23 Sep. 2002 amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [2002] OJ L 269/15. In 2006, Council Directive 2006/54/EC of 5 Jul. 2006 on

extend the protection against sex discrimination to the provision of goods and services.³⁷ Both these Directives were based on Article 13 EC (now 19 TFEU).

After this period, in which the EU legislator took the lead in developing the protection against discrimination within the EU, the ECJ and its AGs have come back to equality and non-discrimination as a general principle of Community law in some cases brought under the Equality Directives of 2000. For example, in *Mangold*, which concerned age discrimination and was a dispute between two private parties (a private employer and a private employee), AG Tizzano mentioned that, even before the adoption of Directive 2000/78, ‘the Court had recognised the existence of a general principle of equality which is binding on Member States “when they implement Community rules” and which can therefore be used by the Court to review national rules which “fall within the scope of Community law”’.³⁸ He considered that the general principle of equality has a clear, precise and unconditional content ‘which is binding on all legal persons and can therefore be relied upon by private parties both against the State and against other private parties’. AG Tizzano had no doubt that ‘the national court would have to disapply a national rule held contrary to that principle which is regarded as having direct effect’.³⁹

The ECJ mentioned in the same case that ‘the principle of non-discrimination on the ground of age must thus be regarded as a general principle of Community law’.⁴⁰ The Court then held that:

it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.⁴¹

Therefore, both the AG and the ECJ consider that a national rule that conflicts with the general principle of equality should be disapplied by the national courts. As McCrudden and Kountouros write: ‘this appears to create the possibility of the evolution of a body of EU non-discrimination law through direct application of the general principle of non-discrimination, if the ECJ is prepared to continue in the direction implied by the judgment’.⁴² This body of non-discrimination law goes ‘beyond the existing secondary legislation’.⁴³ And, according to Schiek, the ECJ emphasized in *Mangold*⁴⁴ ‘once again the

the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast) [2006] OJ L 204/23 was adopted which recast seven previous sex equality directives, including Directives 76/207 (Equal Treatment Directive) and 2002/73, into one consolidated directive.

³⁷ Council Directive 2004/113/EC of 13 Dec. 2004 Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37.

³⁸ Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981, para. 38 (AG Tizzano).

³⁹ *Ibid.*, paras 84 and 101 (AG).

⁴⁰ *Ibid.*, para. 75 (ECJ).

⁴¹ *Ibid.*, para. 77 (ECJ).

⁴² C. McCrudden & H. Kountouros, ‘Human Rights and European Equality Law’, in *Equality Law in an Enlarged European Union Understanding the Article 13 Directives*, ed. H. Meenan (Cambridge: CUP, 2007), 73, 90. See also European Network of Legal Experts in the Non-discrimination Field, 3 *European Anti-discrimination Law Review* (2006), 46 <www.migpolgroup.com/public/docs/27.European%20Anti-discriminationLawReview-Issue3_EN_04.06.pdf> (accessed 18 Oct. 2010).

⁴³ European Network of Legal Experts in the Non-discrimination Field, *supra* n. 42, at 46.

⁴⁴ See *supra* n. 38.

fundamental importance of the principle of equal treatment as a constitutional principle under Community law' and 'held that there is a prohibition to discriminate on grounds of age as a general principle of Community law independently from the Directive (para. 74) which constitutes a part of the general principle of equal treatment as a fundamental right under Community law (para. 75)'.⁴⁵

*Mangold*⁴⁶ thus appears to give a very wide application to the general principle of equality/non-discrimination and suggests that contrary national legislation should be disapplied. Therefore, this case suggests that the general principle of equality/non-discrimination has direct effect between two private parties, and because this general principle includes the principle of non-discrimination on grounds of age and, by analogy, on the other grounds covered by the EU Equality Directives, it suggests that the Equality Directives also have direct effect between private parties. This analogy between the principle of non-discrimination on grounds of age and on the other grounds in the Directive is also made by Schiek, who writes that 'the recognition of the constitutional quality of the prohibition on discrimination will surely have consequences beyond *Mangold*, especially as it can hardly remain confined to the ground of age. Its effects on the whole framework of equal treatment of persons may be awaited with excitement'.⁴⁷

It is submitted that *Mangold*⁴⁸ suggests that the Equality Directives, because they are a specific expression of the general principle of equality, have horizontal direct effect as well. This conclusion appears to be at odds with the conventional doctrine that EU Directives are considered to have only vertical direct effect, providing certain conditions are fulfilled, but not horizontal direct effect. This conventional doctrine means that Directives can be invoked by private parties before a national court against the state or against an emanation from the state (vertical) but not against other private parties (horizontal). It must be noted that Schiek does not appear to agree with this interpretation of *Mangold*,⁴⁹ as she writes that, holding that a national law should be disapplied does not mean that the directive applies horizontally. Because 'a directive – or rather a constitutional principle upon which a directive is framed – having direct effect on a legislative activity that impacts on horizontal relations is not the same as a directive having horizontal effect itself'.⁵⁰ In other words, Schiek seems to argue that it is the national law which has effect on horizontal relations between private parties and that, even if this law must be disapplied, this does not mean that the Directive steps 'into any void' left by the disapplication.⁵¹ The Directive is, thus, not directly effective in horizontal situations, but the national law is. However, Schiek writes that 'the non-applicability of laws infringing a Directive *will not in all cases* [my italics] lead

⁴⁵ D. Schiek, 'The Court of Justice Decision in *Mangold*: A Further Twist of Effects of Directives and Constitutional Relevance of Community Equality Legislation', *Industrial Law Journal* 35, no. 3 (2006): 333–334.

⁴⁶ See *supra* n. 38.

⁴⁷ Schiek, *supra* n. 45, at 335.

⁴⁸ See *supra* n. 38.

⁴⁹ *Ibid.*

⁵⁰ Schiek, *supra* n. 45, at 337–338.

⁵¹ *Ibid.*, 338.

to direct effect in horizontal situations'.⁵² This appears to suggest that it can, in some cases, do so. It is submitted, based on *Mangold*,⁵³ that a Directive does lead to horizontal direct effect when it is a specific expression of a general principle of EU law. However, Schiek also writes that, in *Mangold*,⁵⁴

the fundamental constitutional relevance of the prohibition of age discrimination is apparent, as it is not infringement of the directive which is decisive, but the constitutional principle itself. Accordingly, the direct effect of a constitutional principle is confirmed for the second time, albeit implicitly.⁵⁵

Therefore, it is submitted that the practical effect of holding a Directive, which is an expression of a general principle directly effective in horizontal situations or holding the fundamental principle itself directly effective in such situations, will be the same: the prohibition of (age) discrimination is held to be horizontally directly effective. However, it is submitted that the interpretation of *Mangold*⁵⁶ as establishing horizontal direct effect of the Equality Directives is supported by the 2010 case of *Kucukdeveci*.⁵⁷

Before discussing that development, it has to be pointed out that there are limits to the equality or non-discrimination principle as a fundamental principle of EU law: as is clear from *Chacon Navas*⁵⁸ and *Bartsch*,⁵⁹ it only applies to national provisions, which fall within the scope of Community law, that is, where a question of Community law is involved. In *Chacon Navas*, where the Court had to decide whether illness was included in the definition of disability, the ECJ repeated that 'fundamental rights which form an integral part of the general principles of Community law include the general principle of non-discrimination' but then continued 'that principle is therefore binding on Member States where the national situation at issue in the main proceedings falls within the scope of Community law'. It did add to this: 'however, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof'.⁶⁰

And in *Bartsch*, which concerned age discrimination in occupational pension schemes, AG Sharpston considered that one should be slow to exclude the possibility that a general principle of Community law may, in appropriate circumstances, be applied horizontally, but that the situation in this case did not fall within the scope of Community law. The AG did accept 'that such a principle can apply (both vertically and horizontally) to the extent that it does so within a specific Community law framework'.⁶¹ The ECJ again held that 'the application, which the courts of Member States must ensure, of the prohibition under

⁵² *Ibid.*

⁵³ *Supra* n. 38.

⁵⁴ *Ibid.*

⁵⁵ Schiek, *supra* n. 45, at 337.

⁵⁶ See *supra* n. 38.

⁵⁷ Case C-555/07 *Kucukdeveci v. Swedex GmbH & Co. KG*, judgment 19 Jan. 2010.

⁵⁸ Case C-13/05 *Chacon Navas v. Eurest Colectividades SA* [2006] ECR I-6467.

⁵⁹ Case C-427/06 *Bartsch v. Bosch und Siemens Hausgerate (BSH) Altersfursorge GMBH* [2008] ECR I-7245.

⁶⁰ *Chacon Navas*, *supra* n. 58, para. 56.

⁶¹ *Bartsch*, *supra* n. 59, paras 85–87 (AG Sharpston).

Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law'.⁶²

In two cases decided in January 2010, the ECJ again came back to the general principle of equality. *Petersen*⁶³ concerned a German measure which limited the admission of dentists to provide panel dental care (under a statutory insurance scheme) to dentists under the age of 68. The ECJ decided that if legislation is contrary to the Employment Equality Directive, the national court should decline to apply that legislation, even if the legislation existed before the Directive and even if the legislation did not make a provision for disapplying it in the event of incompatibility with Community law.⁶⁴ In *Kucukdeveci*,⁶⁵ AG Bot repeated that the ECJ had held that the principle of non-discrimination on grounds of age is general principle of Community law. He then went on to say that:

... a directive which has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle. The Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive intended to counteract discrimination may be relied on *in proceedings between private parties* [my italics] in order to set aside the application of national rules which are contrary to that directive. That position is, in my view, the only one which can be reconciled with what the Court decided in *Mangold*.⁶⁶

AG Bot considered that the ECJ has 'long considered that the general principle of equal treatment is one of the fundamental principles of Community law' and mentioned the functions these principles perform – they can be used to fill gaps in secondary legislation, to aid interpretation and to review the validity of Community acts. The AG continued that, if 'national rules are contrary to Community law, the national court will have to disapply them, in accordance with the principle of the primacy of Community law'.⁶⁷

The last three paragraphs of the AG's considerations are interesting because he discusses the horizontal direct effect of the Equality Directives. AG Bot writes:

To adopt such an approach in the present case would not force the Court to reverse its earlier case-law concerning the absence of horizontal direct effect of directives. ... If the Court wishes to maintain its general unwillingness to disconnect 'substitution' direct effect from the right to plead the exclusion of national legislation, the specific nature of the directives intended to counteract discrimination allows it, in my view, to adopt a solution of more limited scope which, at the same time, has the merit of being consistent with the case-law it has developed in regard to the general principle of equal treatment and non-discrimination. From that point of view, it is because it implements that principle in regard to the prohibition of age discrimination that *the right to plead Directive 2000/78 in proceedings between private parties* [my italics] is strengthened.⁶⁸

⁶² *Bartsch*, *supra* n. 59, para. 25.

⁶³ C -341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, judgment 12 Jan. 2010 [2010] IRLR 254.

⁶⁴ *Ibid.*, paras 80–81.

⁶⁵ Case C-555/07 *Kucukdeveci v. Swedex GmbH & Co. KG*, Opinion AG Bot 7 Jul. 2009.

⁶⁶ *Ibid.*, paras 70–71.

⁶⁷ *Ibid.*, paras 79–80.

⁶⁸ *Ibid.*, paras 88–89.

AG Bot thus suggests that the Equality Directives have horizontal direct effect precisely because they are implementing the general principle of equality. This is confirmed by the following:

To finish, I would like to point out that, given the ever increasing intervention of Community law in relations between private persons, the Court will, in my view, be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights. Those situations will probably increase in number if the Charter of Fundamental Rights of the European Union becomes legally binding in the future, since among the fundamental rights contained in that charter are a number which are already part of the existing body of Community law in the form of directives. In that perspective, the Court must, in my view, think now about whether the designation of rights guaranteed by directives as fundamental rights does or does not strengthen the right to rely on them in proceedings between private parties. The present case offers the Court an opportunity to set out the answer which it wishes to give to that important question.⁶⁹

The ECJ in this case confirmed that the principle of non-discrimination on grounds of age is a general principle of EU law in that it constitutes a specific application of the general principle of equal treatment.⁷⁰ It referred to the fact that Article 6(1) TEU makes the EU Charter of Fundamental Rights legally binding and that Article 21(1) of the Charter includes a prohibition of age discrimination and it considered that this principle is only applicable to situations which fall within the scope of Community law.⁷¹ The ECJ then repeated what it had said in *Mangold* and *Petersen*,⁷² that the national court, *in proceedings between individuals* [my italics], must provide the legal protection which individuals derive from European Union law and ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to the principle of non-discrimination on grounds of age.⁷³ The ECJ did not mention anything about horizontal direct effect, but the words ‘in proceedings between individuals’ indicate that the principle of non-discrimination and the Equality Directives as a specific application of this principle should have such effect.

This extension of the direct effect of the Equality Directives and the principle of equality/non-discrimination to horizontal situations is confirmed in a number of opinions of AGs since then, although with some of the AGs expressing reservations about the acceptability of this. See, for example, AG Trstenjak in *Rosenbladt*⁷⁴ who refers to *Kucukdeveci*⁷⁵ in a footnote:

In that judgment the Court had regard to the general principle of non-discrimination on grounds of age. However, the Court appears to take the view that this principle of primary law can be fleshed out by the secondary-law Directive 2000/78 in such a way *that it also applies if the directive cannot be applied between private individuals*. [My italics] In such cases, in examining the general principle, the Court

⁶⁹ *Ibid.*, para. 90.

⁷⁰ *Kucukdeveci*, *supra* n. 57, paras 21 and 50.

⁷¹ *Ibid.*, paras 22–23.

⁷² *Mangold*, *supra* n. 38, and *Petersen*, *supra* n. 63.

⁷³ *Kucukdeveci*, *supra* n. 57, paras 51 and 56.

⁷⁴ Case C-45/09 *Gisela Rosenbladt v. Oellerking GmbH*, Opinion AG Trstenjak 28 Apr. 2010, n. 27.

⁷⁵ See *supra* n. 57.

appears to apply conditions which correspond to those under Directive 2000/78, with the result that inferences can be drawn as to the interpretation of the directive. In my view, it needs to be discussed whether the legal construct to the effect that a general legal principle or a fundamental right is fleshed out by secondary legislation so that it can ultimately also be applied between private individuals when the secondary legislation itself is not applicable is acceptable. There is no need to engage in that discussion in the present case because the application of the general legal principle is ultimately not relevant.

Therefore, AG Trstenjak suggests that a discussion is necessary as to whether this extension of the effect of Directives to apply between private individuals via a general principle of EU law, as the ECJ has suggested, is acceptable.

In *Andersen*,⁷⁶ AG Kokott repeats that the prohibition of age discrimination must be regarded as a general principle of EU law⁷⁷ and writes that the ECJ has, in two cases (referring to *Mangold* and *Kucukdeveci*⁷⁸) ‘relied directly on the general legal principle of the prohibition of age discrimination, stating that it is the responsibility of the national court to “set aside”, where necessary, any provision of national law which may conflict with that prohibition’.⁷⁹ AG Kokott calls this a ‘controversial derivation of that general principle’⁸⁰ and then opines that this ‘appears to be a makeshift arrangement for the purposes of resolving issues of *discrimination in legal relationships between individuals* [my italics], in which Directive 2000/78 is not as such directly applicable and cannot therefore replace national civil or employment law’.⁸¹ The AG then agrees with AG Trstenjak in saying that ‘the idea of an in-depth reappraisal and examination of the doctrinal basis of the controversial horizontal direct effect of general legal principles or fundamental rights between individuals is certainly appealing’. She concludes that this is not necessary in this case, as here there is clearly a vertical relationship.⁸² AG Kokott repeats this in her opinion given on the same day in *Roca Alvarez* but again states that this need not be discussed in the case.⁸³

In *Römer*,⁸⁴ AG Jaaskinen does not express any opinion about the desirability of or the need for discussion of the possible horizontal direct effect of general principles of EU law or of directives, but he does refer to the fact that the ECJ has accepted that the prohibition of discrimination on grounds of age is a general principle of EU law⁸⁵ and expresses the opinion that this should be equally applicable to the prohibition of discrimination on the grounds of sexual orientation and thus that this prohibition is also a general principle of EU law.⁸⁶ AG Jaaskinen then states that it cannot be excluded that, if the present case does not fall within the Employment Equality Directive, the regulation in question will be held

⁷⁶ Case C-499/08 *Ole Andersen*, Opinion AG Kokott 6 May 2010.

⁷⁷ *Ibid.*, para. 21.

⁷⁸ *Mangold*, *supra* n. 38 and *Kucukdeveci*, *supra* n. 57.

⁷⁹ *Andersen*, *supra* n. 76, para. 22.

⁸⁰ *Ibid.*, n. 16.

⁸¹ *Ibid.*, para. 22.

⁸² *Ibid.*, para. 23.

⁸³ Case C-104/09 *Pedro Manuel Roca Alvarez v. Sesa Start Espana ETT SA*, Opinion AG Kokott 6 May 2010, paras 54–56.

⁸⁴ Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*, Opinion AG Jaaskinen 15 Jul. 2010.

⁸⁵ *Ibid.*, para. 124.

⁸⁶ *Ibid.*, para. 131.

contrary to the general principle that discrimination on the ground of sexual orientation is prohibited.⁸⁷

In *Association Belge des Consommateurs Test-Achats ASBL and Others*,⁸⁸ AG Kokott does not express any opinion on the horizontal direct effect of directives or of the general principles of EU law, but she does point out that the ECJ has consistently stressed the fundamental importance of the principle of equal treatment for men and women.⁸⁹ She then states that:

I would like to add that the prohibition against discrimination on grounds of sex does not have to be spelled out in any way by the Union legislature. The fact that the Union legislature from time to time resorts – and in light of the aims of the Treaties should resort – to measures of secondary law to promote equal treatment for men and women and to combat continuing discrimination between them does not qualify the importance of the principle of equal treatment as a fundamental right and a constitutional principle of the European Union, but actually emphasises its prominent position in all areas.

If the Union legislature takes ‘action’ within the meaning of Article 13(1) EC [now Article 19(1) TFEU] to combat discrimination and to promote equality between men and women, then it has to do so in accordance with the requirements of the principle of equal treatment, which is enshrined in primary law.⁹⁰

If the principle of equal treatment is enshrined in primary law, then – because all primary law has both vertical and horizontal direct effect – it has both vertical and horizontal direct effect, and it is thus also applicable between private parties. Can the latter paragraph be taken to suggest that ‘action’ taken based on Article 13 EC/Article 19 TFEU – the Equality Directives are based on Article 13 EC – would have the same horizontal direct effect? It is not clear from the opinion, whether the AG is indeed suggesting this.

The ECJ has recently given judgments in *Roca Alvarez*, *Rosenbladt* and *Andersen*,⁹¹ but in none of these judgments does the ECJ refer to the general principles of EU law or to the horizontal direct effect of these principles or of directives, which are an expression of the general principle of equality and non-discrimination. This might simply be because, as the AGs in these cases already stated, to decide the case in question, it was not necessary to address the issue.

4. CONCLUSION

It will be clear from the above that the principle of equality and non-discrimination has been firmly established as a general, fundamental – in Schiek’s words, constitutional⁹² – principle of Community law, both via the case law of the ECJ and via EU legislation prohibiting discrimination on a number of grounds. It was suggested that the ECJ was the leading force in developing this principle until about 2000, when the EU legislator took over and a

⁸⁷ *Ibid.*, paras 132 and 134.

⁸⁸ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others*, Opinion AG Kokott 30 Sep. 2010.

⁸⁹ *Ibid.*, para. 31.

⁹⁰ *Ibid.*, paras 38–39.

⁹¹ *Roca Alvarez*, *supra* n. 83, Judgment 30 Sep. 2010; *Rosenbladt*, *supra* n. 74, and *Andersen*, *supra* n. 76, both Judgments 12 Oct. 2010.

⁹² Schiek, *supra* n. 45.

number of Directives on the basis of Article 13 EC (now Article 19 TFEU) were adopted as well as the EU Charter of Fundamental Rights. After this legislative activity, the ECJ took up the baton again in a number of cases under the Equality Directives and developed the principle of equality and non-discrimination further. In these cases, the ECJ has expressed clearly that the prohibition of age discrimination in the Employment Equality Directive is a specific application of the general principle of equal treatment and non-discrimination and that the national courts have the responsibility to provide the legal protection individuals derive from Community law and to ensure that these rights are fully effective, setting aside any provision of national legislation which is contrary to Community law. Therefore, the national courts, in proceedings between individuals, must, if necessary, disapply such provisions.⁹³

By analogy, if the principle of non-discrimination on the grounds of age, as laid down in the Employment Equality Directive, is a general principle of Community law, the principles of non-discrimination on any of the other grounds in the Employment Equality Directive – religion or belief, disability and sexual orientation – are also general principles of Community law.⁹⁴ And again by analogy, the same can be argued for the principles of non-discrimination on the grounds of racial or ethnic origin and on the grounds of sex, as the Race Directive and the Recast Sex Equality Directive⁹⁵ provide very similar protection against discrimination to that provided by the Employment Equality Directive.⁹⁶ The only limitations on the general principle of equality and non-discrimination appear to be that it is not applicable to situations which do not fall within the scope of Community law and that it does not mean that the scope of the Directives can be extended by analogy beyond the grounds listed in the Equality Directives.

Therefore, the case law of the ECJ has developed towards a, both vertically and horizontally, directly effective principle of equality and non-discrimination and indicates that the Equality Directives, as a specific application or expression of this principle, also have both vertical and horizontal direct effect. The case law of the ECJ has, thus, continued in the direction of ‘the evolution of a body of non-discrimination law going beyond the existing secondary legislation through the direct application of the general principle of non-discrimination’.⁹⁷

So, although there are limitations on the principle of equality as a general principle of EU law, it is submitted that the ECJ has extended this principle as far as it can within the scope of EU law. The general principles of EU law are applicable to the EU Institutions and to the Member States when they are implementing EU law, and the ECJ has now decided that the national courts, in proceedings between individuals, must, if need be, disapply any provision of national legislation contrary to the principle of non-discrimination. This suggests that a strong general principle of equality/non-discrimination exists, which goes beyond the EU Directives prohibiting discrimination and which gives these Directives, as specific expressions of this principle, horizontal as well as vertical direct effect.

⁹³ See *Mangold, Petersen and Küçükdeveci*, *supra* ns 38, 63 and 57, respectively.

⁹⁴ See, for example, AG Jaaskinen in the *Römer* case, *supra* n. 84, in relation to sexual orientation.

⁹⁵ See *supra* n. 36.

⁹⁶ See on this also Schiek who, as already quoted, writes that *Mangold* (*supra* n. 39) could have an effect on the whole framework of equal treatment of persons, *supra* n. 45, at 335.

⁹⁷ McCrudden & Kountouros, *supra* n. 42, at 90.

It is submitted that it is the ECJ that takes the lead in developing a strong right to equality, equal treatment and non-discrimination. As this right is a fundamental human right laid down in all human rights instruments, including the main European instrument, the ECHR, it could be expected that it would be the ECtHR, being a special human rights court, rather than the ECJ, which plays the leading role in this. But it is the ECJ that addresses this fundamental rights issue and has extended this as far as it can. The reason for this might be that the right to non-discrimination as laid down in Article 14 of the ECHR is an accessory right. Article 14 does not give an independent, freestanding right to non-discrimination, but it only secures 'the enjoyment of the rights and freedoms set forth in this Convention' without discrimination. Therefore, discrimination can only be challenged in relation to the other Convention rights. If the ECtHR finds a violation of the substantive article, it often does not consider Article 14. In 2000, Protocol 12 to the ECHR was adopted, which provides an independent, freestanding right to non-discrimination in Article 1. However, this Protocol, which came into force in 2005, has only been signed and ratified by six EU Member States. The ECtHR has, to date, not made any decisions under the Protocol. Whatever the reason, it is still against expectation that it is the EU court, the ECJ, and not the Convention court, the ECtHR, who takes the lead in promoting equality and non-discrimination. It is suggested that, while the ECJ should be applauded for taking such an active role, this does put the ECtHR in a less favourable light.

The suggestion that a strong general principle of equality/non-discrimination exists which goes beyond the EU Directives prohibiting discrimination and which gives these Directives, as specific expressions of this principle, horizontal as well as vertical direct effect means that the prohibition of all grounds covered by EU equality law – sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation – has both horizontal and vertical direct effect and can thus be invoked in all proceedings for national courts, whether between private parties or between a private party and an emanation of the state. This would be particularly important if an Equality Directive is not transposed (fully) or not in the correct way into national law, as the Directive can then be relied on directly.

The development of a strong principle of equality and non-discrimination giving horizontal direct effect to directives which are a specific expression of this principle might even be expanded further in two ways: the ECJ might, in due course, even extend this to the prohibition of discrimination on all the grounds covered in the EU Charter of Fundamental Rights, which could be seen as establishing a fundamental, constitutional principle of equality. And, it could also lead to the development of a broader exception to the theory that directives do not have horizontal direct effect: any directive which is a specific application of any fundamental principle of EU law, would, by analogy, also have horizontal direct effect. Both these developments appear to be hinted at by AG Bot in *Kucukdeveci* as quoted above.⁹⁸

⁹⁸ See *supra* n. 65, para. 90 and n. 69.

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